No. 83-447

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

SEA-LAND SERVICE, INC.,

*Petitioner,*

—against—

CARL O. AKERMANIS,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## REPLY BRIEF OF SEA-LAND SERVICE, INC.

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## INTRODUCTION

At the request of the Court respondent has filed a brief in opposition to the petition for writ of *certiorari* marshalling arguments in support of a conclusion that the decisions appealed from "do not involve any novel or complex issue nor do they in any way conflict with the decisions of this Court or those of other courts of appeals" [Brief p. 5]. These arguments are illogical, inconsistent and contradicted by binding decision to this Court. It is not too much to say that respondent has utterly failed to comprehend (or has sought to confuse) the fundamental issue of the jurisdiction of the United States Courts of Appeals and, in an appropriate case, their duty to affirm.

The Second Circuit Court of Appeals in its decision of September 14, 1982 (688 F.2d 898, Exhibit "A" to the Petition) reversed the district court "Judgment on a Reduced Verdict" (Exhibit "E") to which respondent had *consented* and, after finding it had appellate jurisdiction to "entertain" the cross-appeal of respondent (upon which it determined that the district court had committed *no* mistake of law or abuse of discretion), remanded the case for reconsideration of the question whether in its "discretion" a new trial ought be granted. Respondent seeks to justify the court of appeal's remand order on inconsistent grounds: that "the court of appeals had jurisdiction to entertain the respondent's cross-appeal" (reason "A" for denying the writ) or that it had not (reason "B"); and in either case that the district court retained unfettered jurisdiction to reconsider as mandated the question whether a new trial should be granted (reason "C").

By way of summary of argument, respondent argues that "[t]his Court need not decide whether the court of appeals had jurisdiction over the cross-appeal because the court of appeals

had power to *reverse* the judgment and remand without considering the cross-appeal" (Brief p. 7 emphasis supplied); and also asserts that "[a]fter the final judgment was *properly vacated* by the court of appeals, on remand the district court had the inherent power to rescind or modify its interlocutory order granting a new trial" (*Id.*, emphasis supplied). Similarly, respondent claims that on appeal to the court of appeals he was merely "attacking the order conditionally granting a new trial" (Brief p. 8); not the "remittitur," while immediately adding that the court "[w]ithout considering the [cross] appeal . . . had authority to *remand* to the district court for further proceedings (*Id.*). The last assertion is based on the truly startling claim that it was "only proper for the court of appeals to remand to allow the district court to decide what action it should take with knowledge that the remittitur device was not available to it" (*Id.* p. 7).

As an argument apparently predicated upon considerations of fairness or judicial economy, respondent, quoting the court of appeals, also urges that it was " 'conceptually difficult and practically unfair' to hold that the respondent had waived its right to appeal by consenting to a judgment that no longer existed" (*Id.* p. 9-10); and that it was appropriate for the appeals court to then consider, as a cross-appeal issue, the correctness of the district court's determination of jury error (despite in the court of appeals' view the non-finality of the new trial grant after "excision" of the remittitur) for reason of the alleged fact that "[a]t the very least, the order granting a new trial would have been reviewed by the court of appeals following a second trial" (*Id.* p. 13). In way of conclusion, and as a refreshing acknowledgement of the fact that the question whether the court of appeals had jurisdiction to "entertain" the cross-appeal might after all make a difference, respondent argues that "Petitioner is simply upset that its own appeal of the original judgment has resulted in the imposition of greater liability against it," since "[h]ad the Petitioner not appealed the remitted judgment its liability would have been reduced by 25% (sic)" (*Id.* p. 6).

The first question presented by this petition is appealability, a matter of a line of decisions by this Court stretching back to

1889. The second and perhaps more important is reviewability, an issue controlled by the United States Constitution (Amend. VII) and the Judiciary Act of 1789, both of which are 100 years older.

## A) APPEALABILITY

Throughout his brief respondent resolutely ignores the law settling the question of the impact on his right to appeal (*as opposed to his rights upon appeal*) which followed his consent to the Judgment on a Reduced Verdict. Because of his consent, respondent was unquestionably barred from "appeal[ing] the propriety of . . . [the] . . . remittitur order to which . . . [he] . . . ha[d] agreed" (*Donovan* v. *Penn Shipping Co., Inc.*, 429 U.S. 648, 649 (1977)), and as a result could not "attack[ ] the remittitur" which in his answering brief respondent *denies* doing in the court of appeals (*Id.* p. 8).[1] Despite this, it is clear that the question of threshold issue mistake—that the district court had assessed the correctness of the jury's contributory negligence verdict in error—*could have been* raised by respondent as appellee, since potentially before the court of appeals because of petitioner's appeal which challenged the remittitur upon the assumption that the new trial was properly granted. But respondent, as appellee, could have argued district court error in refusing to accept the jury verdict *only* in support of an affirmance of the judgment to which he had consented. As appellee, respondent had a right to make *any* argument in *support of* the judgment appealed from. *Dandridge* v. *Wil-*

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1 The assertion is, however, flatly untrue. In his "Brief for Plaintiff-Appellee-Cross-Appellant" in appeal nos. 81-7833/73 (p.43) respondent asserted: "[t]he reduction of the total award by the trial court in finding that the jury erred in finding the plaintiff 4% contributorily negligent is not an additur nor is it a remittitur and constituted an abuse of discretion and an error of law in violation of plaintiff's right to a trial by jury." Importantly, respondent's assignment of error in the court of appeals was based on *two* grounds: (1) the district court could not validly order the remittitur; and, (2) the trial judge had done so in error as a result of mistakenly deciding the threshold jury error issue on a basis confusing contributory negligence and assumption of risk (*Id.* at p. 44) or as a result of an abuse of his discretion.

*liams*, 397 U.S. 471, 475 n. 6 (1970). It is settled law that "[an] appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matters overlooked or ignored by it." *United States* v. *American Ry. Express Co.*, 265 U.S. 425, 435 (1924).

Thus, respondent, despite his consent to the remittitur, had the limited right to urge that although the district court erred in conditioning the denial of petitioner's new trial motion on respondent's acceptance of an invalid remittitur, the Judgment on a Reduced Verdict should be *affirmed* because the district court had *also* committed reviewable error in concluding that there ought to be a retrial because the jury's fact finding was "clear and serious error." See, *Durant* v. *Surety Homes Corp.*, 582 F.2d 1081, 1085 (7 Cir. 1978).

But respondent challenged the correctness of the district court's determination of the jury error issue not, as solely appropriate, as appellee in support of affirmance, but as cross-appellant seeking entry of judgment on the jury verdict.[2] As a result, the question of the correctness of the district court's decision on the threshold issue might be said to have been *res judicata*, not on account of respondent's consent, but for reason of lack of effective challenge as appellee.

As a general matter only a party cast in judgment has standing to appeal, despite the fact that an issue not necessary to the ultimate determination was resolved against the prevailing party. *Lindheimer* v. *Illinois Bell Telephone Co.*, 292 U.S.

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2 In his "Brief for Plaintiff-Appellee-Cross-Appellant" in appeal nos. 81-7833/73, respondent failed entirely to discriminate those arguments (if any) which he intended to make as appellee, as opposed to as cross-appellant. As a matter of definition, however, an appellee's arguments are in support of affirmance. Thus, the "Conclusion" of respondent's brief on the appeal and cross-appeal was as follows: "In view of the foregoing, the defendant's appeal should in all respects be denied and plaintiff's appeal [seeking entry of judgment on the jury verdict] in all respects granted." But an "appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary . . ." *United States* v. *American Railway Express Co.*, *supra*, 265 U.S. at 435.

151, 176 (1934); *New York Telephone Co.* v. *Malthie*, 291 U.S. 645 (1934); *Public Service Commission* v. *Brashear Lines*, 306 U.S. 204 (1939). In in such circumstances if the party cast in judgment appeals, it "behooves" the party in whose favor judgment was entered as appellee, to "present all possible grounds for affirmance to the appellate court, including the argument that, as to the issue adjudicated against him, the trial court was in error." Moore's, *Fed. Prac.*, Vol 1B § 0.416[5] p. 533-534. Such obligation is more than a precautionary measure, necessary to avoid implication that the "adverse issue" was dispositively adjudicated (*Id.* at p. 533), where as here, the adverse issue—jury mistake in assessing contributory negligence—was the basis of the district court's mistaken remittitur.

Since the court of appeals was required to treat respondent's cross-appeal as barred by his consent, the result, if his argument of district court mistake on the predicate issue (if properly treatable as made by respondent as appellee) had been considered and accepted, would have been affirmance of the Judgment on a Reduced Verdict. Nonetheless, as a necessary preliminary to enhancing respondent's position as a direct consequence of his consent, by extending to him as a result the possibility of obtaining a judgment without retrial for more than he had agreed to take; and in order to avoid this Court's decision in *Donovan* v. *Penn Shipping Co., Inc., supra*, the court of appeals described the issue preliminary to remand as follows: 688 F.2d at 903 [A-8].

> [w]hat we really face is an issue that has nothing to do with acceptance of remittitur: [it is] whether a cross-appeal will lie as to a non-final order for a new trial when the main appeal from a final judgment has already brought the case to an appellate court.

But if the appeal truly had "nothing to do with acceptance of remittitur" there would be, of course, no reason for petitioner's challenge to respondent's right to a cross-appeal. And neither would petitioner be "upset" because its own appeal from the original judgment could not have "resulted in imposition of [21%] greater liability against it."

It is certain from this Court's holding in *Donovan* v. *Penn Shipping Co., Inc.*, *supra*, that respondent could not himself appeal from the propriety of *entry of* the "remittitur order" to which *entry* he agreed, and that he had, hence, no right to challenge, *as a basis for entitlement to a judgment upon the jury's verdict*, the threshold jury error finding either on the appeal decided September 14, 1982, *or* on any prospective appeal after retrial. The argument raised by the Court of Appeals, that respondent, unless the cross-appeal could be considered, would be unfairly denied an "appeal", as a result of a bargain (for an invalid remittitur) of which he was deprived, is proven invalid by the fact that he might have gotten what he agreed to by urging predicate issue error as grounds for affirmance, despite the invalidity of the remittitur. And this would merely hold respondent to what he, after all, bargained for: the Judgment on a Reduced Verdict proof against attack on appeal on the basis of argument that a new trial should not even conditionally been granted. It is for reason *precisely* of the fact that it was *not* "conceptually difficult and practically unfair to think of the plaintiff as having waived a cross-appeal by consenting to judgment that no longer exists" (688 F.2d at 903, A-7)—because respondent lost nothing necessarily in way of appeal *argument* and, despite the remittitur's invalidity, got exactly what he bargained for—that the court of appeals' refusal to follow *Donovan* is proven to be error.[3]

Because respondent (as appellee) *had* the right to challenge the district court's threshold finding, *Donovan* v. *Penn Shipping Co., Inc.*, *supra* cannot validly be distinguished. And this

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3 Respondent was "bettered" by consenting to the remittitur—he got more than he had agreed to take and a re-trial was avoided on the "liability issue" and with that the possibility of a defendant's verdict. This result cannot be permitted. *Mattox* v. *News Syndicate Co.*, 176 F.2d 897, 904 (2 Cir. 1949). Similarly, the court of appeals did not need to invent Rule 50(c) F.R.Civ.P. "jurisdiction" over the cross-appeal in order to consider whether there was reviewable threshold issue error; and its doing so cannot be said to have promoted "judicial economy."

Court's holding was violated, a conclusion proven by the fact that judgment was thereafter entered on the jury verdict, a result the *Donovan* holding absolutely does not allow.[4]

But, in any event, the court of appeals simply had no right to treat the district court's determination of the threshold issue as *other than* an issue that it either (1) needed to *decide* in the main appeal (in order to assert respondent's right as appellee to seek an affirmance); or (2) had to *assume* as settled for all purposes (objection having been deliberately or inadvertently abandoned because not *appropriately* challenged on appeal).

The court of appeals, indeed, had the power (and obligation) to reverse without considering the cross-appeal; but only to order a new trial by affirming the district court's exercise of discretion or holding that the issue of threshold error had been abandoned. And with that would have resulted the *loss* by the district court of its "inherent power" to recall its no longer interlocutory but affirmed (or dispositively adjudicated) new trial grant. *United States* v. *ex rel. GREENHALGH v. F.D. Rich Co., Inc.*, 520 F.2d 886 (9 Cir 1975).

## B) REVIEWABILITY

Having had *in no event* power to ever review the district court's new trial order for "error" of the kind the appeals court asserted, the court of appeals had no authority to remand to the district court for further consideration. A trial judge is not required to enter supporting findings of facts and conclusions of law where granting a new trial motion. *Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 36 n. 3 (1980)

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4 Respondent, for this reason, could not properly have attacked the remittitur, a matter so obvious as to encourage denial of respondent's former appeal position. Petitioner surely attacked the remittitur; and successfully—the district court's "remittitur" was an additur. But *by virtue of* being *right* on appeal (since if petitioner had been *wrong* there would have been no conceptual difficulty or practical unfairness resulting from affirmance) petitioner pays 21% more. Small wonder petitioner is "upset."

and Rule 52(a) F.R.Civ.P.[5] For this *additional* reason, assuming for purposes of argument only that the court of appeals could have correctly considered the cross-appeal, or, as might appear appropriate, should have considered respondent's arguments for reversal as grounds for affirmance, it had to decide the question of alleged predicate issue mistake, since *ripe* for review, on the basis of the record as it then stood. And since the district court's "clear and serious error" finding (if brought before the court) was not reviewable, the new trial grant had to have been affirmed.

There can be no question that the court of appeals violated United States Constitution, Amend. VII and the Judiciary Act of 1789 in re-examining facts found by the jury. The court of appeals asserted a right to remand the case because of possibility of district court error of a kind which is *undeniably* non-reviewable. *Fairmont Glassworks* v. *Cub Fork Coal Co.*, 287 U.S. 474 (1933). Where an appeal to a court of appeals involves only argument from conflicting interpretations of facts underlying a grant or denial of a motion for a new trial, one of which, as here, finds support in the evidence (as the court of appeals specifically held), and which, for that reason, does not present a reviewable issue of law, the court on its own motion should dismiss as "frivolous." *United States* v. *Johnson*, 327 U.S. 106, 113 (1946).[6] *A fortiorari*, where in deference

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5 Despite this, respondent justifies the extravagance of the court of appeal's decision, requiring the district court to consider a factual "argument" not thought of by counsel or the district court, because "the district court's opinion did not adequately set forth the court's reasons. . ." (Brief p. 16); and, because "[c]ertainly the court of appeals had the authority, if not the obligation, to point out to the district court that the latter's basis for ordering a new trial needed further elaboration." (*Id*).

6 *Johnson*, *supra*, was a criminal case. But "[t]here is no policy reason—indeed, if anything, the policy is less—for a broader scope of appellate review of findings of fact made on new trial motions in civil actions than in criminal actions, where the liberty of the defendant is at stake." Moore's *Fed. Prac.*, Vol 6A § 59.15(3) pp. 59-335, n.53.

to the fundamental rule respondent made *no such argument*, the court of appeals' mistaken labor on his behalf cannot be appropriate.

## C) THE SUBSEQUENT "DISCRETION" OF THE DISTRICT COURT

Respondent argues that the court of appeals "did not consider the cross-appeal and did not act on the cross-appeal" (Brief p. 14); and that the district court was not "unduly" influenced by the court of appeals' opinion (*Id* p. 17). The district court's remittitur was, whatever else, an expedient; an alternative to a new trial. Respondent insultingly insists that the unavailability of remittitur was a matter which the trial judge should *properly* have been asked to consider in determining whether to grant a new trial. Yet, respondent would appear to be claiming that the district court was not influenced (unduly?) by the fact that it had been told that if it changed its mind and declined to order a new trial on the basis of the *alternative* expedient offered by the court of appeals (and, as subsequent events proved, any other) its decision would be affirmed. Respondent's argument, untenable on its own terms, admits that the court of appeals' opinion was purely advisory.

The issues raised by this petition must in any event be considered in light of what the result would have been had the court of appeals acted properly; not whether, despite the fact that the court acted improperly, its error can be said to have been without effect.

## CONCLUSION

The court of appeals decision of September 14, 1982 represents error of a most sensitive kind. However unintended, the disposition of this case can be read as suggesting that it is permissible for the district courts to abandon concern for whether a jury's verdict is manifestly unjust; that avoidance of re-trial as a matter of needed "judicial economy" is *the* appropriate guide and that the court of appeals is entitled by whatever means to require adherence to this view. Surely, the court of appeals simply erred in reaction to too great concern for the alleged "sanctity" of jury verdicts; but this too is error. It should be reminded that insistence upon more exact justice, greater predictability and higher standards of what constitutes appropriate trial "tactics"—not exercise of invented powers having the likely result of making the problem worse—is the sole appropriate and effective response to increasing calendar pressure.

Respectfully submitted,

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